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USTR FOR JENNIFER CHOE GROVES
STATE FOR EB/TPP/IPE JENNIFER BOGER

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SUBJECT: ECUADOR 2007 SPECIAL 301 REPORT

REF: State 7944

¶1. (SBU) Summary and recommendation. Post concurs with IIPA and PhRMA recommendations that Ecuador remain on the Special 301 Watch List for 2007. Ecuador has not taken sufficient steps to adequately address IPR deficiencies over the past year. Despite some enforcement activities to seize pirated CDs and DVDs, overall enforcement of IPR remains a key problem, resulting in high piracy levels in the software, publishing, recording, and film industries. The Ecuadorian Intellectual Property Institute (IEPI) remains understaffed and underfinanced, resulting in weakened efforts at IPR protection and enforcement.

¶2. (SBU) Data exclusivity and protection continue to be major problems. A recent modification to Ecuador's health code explicitly permits granting marketing approvals without regard to whether or not a medication is patented, which could facilitate the entry of patent-infringing pharmaceutical products. On the other hand, the GOE's proposed budget for 2007 reportedly includes funds to establish a specialized IP court, as required by its 1998 intellectual property law. Further monitoring is required to ensure the GOE meets its domestic and international commitments to IPR protection and enforcement. End summary and recommendation.

¶3. (U) Ecuador's comprehensive Intellectual Property law enacted in May 1998 was a step forward for IPR protection, covering copyright, trademark, patent, and semiconductor chip protection. It also addressed preliminary enforcement measures and other procedures, and required the creation of specialized IP courts. In addition, it created the Ecuadorian Intellectual Property Institute (IEPI).

IEPI

¶4. (SBU) The Ecuadorian Intellectual Property Institute (IEPI) is responsible for patent and trademark registration, and is also the lead GOE agency to coordinate IPR enforcement. However, IEPI remains under-funded and undertakes few enforcement actions as a result. The national police and the customs service are responsible for carrying out IEPI orders, but rarely do so outside of Quito. Current IEPI head Cesar Davila hopes to stay on in his position under Ecuador's new administration and push for stronger IPR enforcement. According to PhRMA, the backlog of pending patent cases within IEPI continued to increase in 2006. Davila reports IEPI does not have the legal authority to work with the Health Ministry on test data issues (see para 10 for discussion on test data).

15. (SBU) New president Rafael Correa has on occasion criticized the current international framework for IPR. In a meeting with a visiting U.S. delegation, he noted that patents and copyrights protect new technologies and make them more expensive, whereas they should be available without cost, to be shared as would a public good. To that end he has suggested establishment of a "world fund" to facilitate technology transfer for developing countries. The Director General for World Trade in the Foreign Ministry told econoff that patenting a product in many cases is taking credit for traditional knowledge that does not belong to the patent holder. Maria Espinosa, the new Foreign Minister (and formerly part of Ecuador's IPR negotiating team for the U.S.-Ecuador FTA) has been a strong proponent of protecting traditional knowledge as intellectual property. Since the Correa administration only took office January 15, as yet it is unclear what practical effect these views will have on IPR protection in Ecuador. It is also unclear whether President Correa will retain Davila as head of the IEPI or how much support his administration will provide IEPI.

Enforcement -----

16. (SBU) Lack of enforcement remains a key problem for Ecuador. Production of pirate CDs is reaching large-scale levels. The recording industry estimates that more than 80 million CD-Rs and DVD-Rs legally enter Ecuador every year and a similar amount enters as contraband, with most destined for piracy. The International Intellectual Property Alliance (IIPA) estimates that pirated products accounted for 98% of the domestic record and music industry in Ecuador in 2006, with estimated damage due to music piracy of USD 33 million. In contrast, the official market for recordings in Ecuador amounted to a mere 400,000 units in 2006, per IIPA, a 21 percent drop from 2005. The IIPA also reports that in 2006 Guayaquil, the largest city in the country, lost its last standing legitimate music seller. There is limited local support or awareness for anti-piracy actions.

17. (SBU) The motion picture and gaming industries suffer equally from widespread CD and DVD copying. Business software piracy, both end-user piracy and pre-installed unlicensed software in new computers, continues to be a problem. Pervasive commercial photocopying piracy victimizes the book publishing industry, including for educational textbooks.

Legal Environment -----

18. (SBU) IEPI's Davila reports that the GOE's proposed 2007 budget includes funds to establish specialized IP courts (as required by the GOE 1998 intellectual property law), which most likely would be used to create tribunals in the major cities of Quito, Guayaquil, and Cuenca. This long-awaited action should improve IPR enforcement since Ecuador's judiciary in the past has largely been ineffective in enforcing the IP law. Post will provide more information when available.

19. (SBU) Reflecting potential positive change in the legal IPR environment in Ecuador, a court decision in 2006 that characterized efforts by a patent holder to remove illegal copies from the market as an illegal competitive practice was overturned on appeal in 2007.

TRIPS Compliance -----

110. (SBU) While the Ecuadorian Intellectual Property Law does provide for data exclusivity, as does TRIPS Article 39.3, marketing approval for copy products has been routinely granted based on data produced by research companies for the original drug. In addition, Instituto Izquieta Perez, the health authority, routinely provides sanitary registrations to copy products of patented drugs. According to PhRMA, the sanitary authorities have approved more than 40 copies of five of the eight innovative pharmaceutical products covered by patents in Ecuador. A recent modification to Ecuador's health code in late 2006 permits sanitary registrations without

regard to whether or not a medication is patented, which could further facilitate the marketing of patent-infringing pharmaceutical products. Ecuador, citing legal opinions from the Andean Court of Justice, has failed to provide patents for second uses.

Comment and Areas for Further Action

¶11. (SBU) IPR enforcement languished for two years under the previous Palacio administration. We do not have any strong indications of what the current Correa administration will do on IPR enforcement. Some of Correa's rhetoric before taking office suggests that he may be ambivalent or even opposed to some aspects of IPR, but we do not know how that will translate into practical results (in other fields, Correa appears to have moderated some of his views upon taking office). Funding for new IPR courts, if it comes to be, would be welcome news that the government will comply with a requirement of the 1998 Intellectual Property Law and ensure that judges with the requisite expertise rule on IPR cases.

¶12. (SBU) Judges, local law enforcement and customs officials need training on intellectual property rights protection and enforcement. (Note: U.S. Patent and Trademark Office training in IP protection and enforcement is a useful tool for this, but Ecuadorian officials are often unable to take full advantage of this training due to limited English skills. Simultaneous interpretation into Spanish or training offered in Spanish would make this program much more accessible to Ecuadorian officials). IEPI should be properly funded to effectively combat piracy and administer IPR laws.

¶13. (SBU) Ecuador should correct contradictions between its Health Code and its Intellectual Property Law, to prevent issuance of sanitary registrations to products that violate registered patents or to products whose applications are based on confidential data submitted by another company.

JEWELL